



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

Promises to Lend, Collateral Warranties, and Red Herrings

Citation for published version:

Hogg, M 2015, 'Promises to Lend, Collateral Warranties, and Red Herrings', *Edinburgh Law Review*, vol. 2015, no. 3, pp. 384-388. <https://doi.org/10.3366/elr.2015.0299>

Digital Object Identifier (DOI):

[10.3366/elr.2015.0299](https://doi.org/10.3366/elr.2015.0299)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

Edinburgh Law Review

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.



Promises to Lend, Collateral Warranties, and Red Herrings

The prolonged litigation between the property developer Derek Carlyle and the Royal Bank of Scotland over the latter's alleged breach of a promise to advance Mr Carlyle money to develop land at Gleneagles reached the Supreme Court in November of last year. The court's decision was handed down on 11 March 2015.¹ The judgments of the courts at all stages in the litigation have raised interesting issues of promise, collateral warranty, and loan, and serve as a warning about the introduction of red herrings into pleadings as well as a reminder of the need for appellate courts to restrain a desire unnecessarily to re-open findings of fact of lower courts.

A. THE FACTS

The essential facts of the litigation were that the appellant, Mr Carlyle, a property developer, had requested the respondent, the Royal Bank of Scotland, to lend him the funds necessary to purchase and develop two plots of land near Gleneagles Hotel, the intention being that he would build on the land, briefly occupy the property so built, and then sell it on at a profit. Similar developments by the appellant had been funded by the respondent in the past. At a meeting between the parties in March 2007, Mr Carlyle's proposal had been discussed, and he had made it clear that he was seeking a full commitment by the bank to fund both the purchase of the land as well as the development of it: the funding of the purchase alone was of no commercial use to him, as he did not have sufficient capital of his own to allow him to develop the land. The bank staff at the meeting, who included a Ms Hutchison, had communicated their understanding of this point, and undertook to liaise with the bank's head office to seek approval of full funding. During a subsequent telephone call, Ms Hutchison had told Mr Carlyle that "You'll be pleased to know it's all approved, Edinburgh [i.e. the bank's head office] are going for it for both houses". In the belief that the bank had thereby committed to providing the full funding being sought for the development, Mr Carlyle proceeded to conclude contracts of loan with the bank for the purchase price

¹ *Carlyle v Royal Bank of Scotland plc* [2015] UKSC 13.

of the properties (but not, at that stage, for the development costs). Ms Hutchison subsequently left the employment of the bank, and Mr Carlyle later dealt with another member of staff who appeared to be unfamiliar with his request for full development funding. In August 2008 (after the onset of the banking crisis of 2007–8), Mr Carlyle was told that the Bank was unwilling to provide the funds for the development. It called up the loans of the purchase price (which had fallen due for repayment), and subsequently raised an action against Mr Carlyle seeking repayment of the sums lent, together with interest. Mr Carlyle counter-claimed, arguing that the undertaking to provide development funding made on the telephone by Ms Hutchison, acting as the bank's agent, had amounted to a "collateral warranty" of which the bank were in breach; and alternatively that, having relied on an assurance by the bank of development finding, the bank was personally barred from seeking repayment of the loan of the purchase price.

B. THE JUDGMENTS

In the Outer House, following a proof before answer, the Lord Ordinary (Glennie) held² that Mr Carlyle had communicated his absolute need for full funding to the bank,³ and that he was entitled to believe (and did believe) that the bank had committed itself to supporting the entire project.⁴ He held that, given the prior communings of the parties about the intended development of the land, viewed objectively Ms Hutchison's statement on the telephone was "intended to be binding or, as it is sometimes put, to have contractual effect".⁵ Ms Hutchison had actual authority to communicate on the bank's behalf,⁶ and her statement had not been too vague to give rise to a binding obligation, as the amount of the further funding needed was known to the parties and the contemplated rate of interest for this further funding was not in doubt.⁷ Focusing in his judgment on the first basis of Mr Carlyle's counterclaim, his Lordship commented that the alternative plea of personal bar added

² [2010] CSOH 3.

³ Ibid para [31].

⁴ Ibid para [32].

⁵ Ibid para [40].

⁶ Ibid para [43].

⁷ Ibid para [42].

nothing to his case. In a subsequent note by Lord Glennie⁸ following further procedure, his Lordship clarified the somewhat vague terms in which he had analysed the obligational basis of the bank's liability, saying:

I had decided that the Bank had given an unconditional commitment, and although I had put it in terms of a bilateral agreement it did not seem to me to make any difference if it were put in terms of a unilateral promise in circumstances where the defender had proceeded with the transaction on the strength of the promise.⁹

Following an appeal by the bank, the Inner House overturned Lord Glennie's decision,¹⁰ holding that, in the telephone call, the bank had *not* intended to undertake any obligation in favour of Mr Carlyle. At most, all it had done was to advise Mr Carlyle of an internal decision, one which amounted to approval in principle to loan the funds to develop the properties.¹¹ An objective observer, informed of the background dealings of the parties, would not have regarded the statement of Ms Hutchison as intended to create a binding obligation, such an obligation being capable of arising only if the parties entered into a written contract (as they had in the past in relation to similar developments). In any event, even had such an intention been present, the terms of any such undertaking were too imprecise to give rise to an obligation.¹² The Court added that it was clear that this was *not* a case of collateral warranty, given that there was no other contract in existence to which the statement could be "collateral".¹³

On a further appeal to the Supreme Court by Mr Carlyle, Lord Hodge (with whom the other Justices agreed) allowed the appeal, set aside the interlocutor of the Inner House, and remitted the case to a commercial judge to "proceed accordingly" (presumably, to assess the damages due by the bank to Mr Carlyle).¹⁴ Lord Hodge began his judgment by firmly reminding the Inner House of the role of appellate

⁸ [2010] CSOH 108.

⁹ *Ibid* para [9].

¹⁰ [2013] CSIH 75.

¹¹ *Ibid* para [57].

¹² *Ibid* para [58].

¹³ *Ibid* para [59].

¹⁴ [2015] UKSC 13.

courts: they are not to depart from findings of fact in first instance judgments unless such are “plainly wrong”. In this case, the Lord Ordinary had found in fact that the statement of Ms Hutchison on the telephone objectively disclosed a promissory intention on the part of the Bank to lend the requested further funds to Mr Carlyle. There was a reasonable basis for the Lord Ordinary to have reached such a finding (even if, Lord Hodge added, he might have reached the opposite conclusion), which ought not therefore to have been disturbed on appeal.¹⁵ The undertaking of the bank was not too imprecise to be enforced.¹⁶ On the question of the proper description of this undertaking, Lord Hodge thought that the term “collateral warranty” had been a “distraction”: “either ‘promise’ or ‘unilateral undertaking’ would have been a suitable choice of words for the independent legal obligation which Mr Carlyle was asserting”,¹⁷ albeit that one could legitimately describe the bank’s promise as having been “collateral” to the other agreements.¹⁸

C. ANALYSIS

To begin with what might be called the legal “red herring” in the case, a few remarks may be offered about the “collateral warranty” description given to the bank’s undertaking by the drafter of Mr Carlyle’s written pleadings. This description was, as Lord Hodge rightly remarked, a distraction. It led Lord Glennie, at first instance, into a prolonged but unnecessary analysis of authorities concerning when, in English law, a representation of fact or of future intention can constitute a binding obligation.¹⁹ A discussion of such authorities was unnecessary for the simple reason that, unlike English law, in Scotland an unaccepted and unreciprocated promise may, if intended to do so by the maker of it, give rise to an immediately binding obligation. Mr Carlyle could simply have pled that the bank had unilaterally promised or undertaken to loan him the further agreed sum needed to develop the property at the applicable rate of

¹⁵ Ibid para [25].

¹⁶ Ibid paras [27]–[28].

¹⁷ Ibid para [33].

¹⁸ Ibid para [36].

¹⁹ [2013] CSOH 3 at paras [37]–[39].

interest for such a loan.²⁰ Though more might be said on the nature of collateral warranties in Scots law, it is therefore unnecessary to do so in this note.

Moving on to the promissory aspect of the case, it may be observed that it is somewhat unsatisfying to be faced in a Supreme Court judgment with the observation that, had the court been deciding the matter of promissory intent itself, it might have decided it one way, but that it is compelled to overturn the decision of the court below to that effect and restore the opposite conclusion of the judge at first instance. In effect, the court is hinting that it thinks that the bank did no more than communicate a decision in principle to provide funding, while implementing a finding that the bank went further than that and made a binding promise. Though Mr Carlyle triumphs, he appears to do so for procedural not substantive reasons. Given the procedural basis of the Supreme Court's decision, it cannot therefore be safely relied upon as an example of the sort of circumstances in which a promise might in the future be held to arise. There is more than a whiff of another unsuccessful case of promise, *Cawdor v Cawdor*,²¹ about Mr Carlyle's circumstances, though rather surprisingly the case is not mentioned in any of the judgments in *Carlyle*.²²

Another slightly unsatisfying aspect of the Supreme Court's decision on the promissory nature of the bank's undertaking is the cursory examination of the alleged lack of specification surrounding the succinctly expressed promise ("You'll be pleased to know it's all approved, Edinburgh are going for it for both houses"). It is no doubt correct, in considering whether such a promise was specific enough, to interpret the nature of the statement in the light of what the prior communications of the parties disclosed about their understanding of the "it" to which the bank was being said to approve: their knowledge of the sum expected to be lent, and the likely interest rate, might perhaps constitute enough by way of minimum legally required content for a promise of loan, though the Supreme Court does not address the further question of

²⁰ As Mr Carlyle's written counterclaim did *not* specifically allege that the bank had made a unilateral promise/undertaking, the Supreme Court's decision that it had represents something of a deviation from the case pled before it. Lord Hodge's observation (in para [36]) that one could describe the bank's undertaking as "collateral" looks like an attempt, perhaps a rather forced one, to anchor the finding of the court in the case as pled.

²¹ [2007] CSIH 3.

²² In *Cawdor* the Inner House concluded that an alleged promise was no more than a communication by a board of trustees of its internal decision to make certain payments to the reclaimers, and as such was no more than an expression of a future intention to undertake a certain act.

what the promised term of any loan was to be (perhaps the same term as in previous loans?). It is however only part of the enquiry to observe, as the Supreme Court does, that what was important was not what the objective observer would expect was necessary for the promise of a loan, but whether “on an objective assessment the bank intended to make a legally binding promise to provide development funding”. This is only part of the relevant enquiry because an intention to enter into an obligation (a matter of fact) is not of itself conclusive as to the existence of the obligation; in addition, the party whose intention is in question must make a declaration which includes sufficient by way of definition of the obligation to meet the minimal legal requirements for constituting the obligation in question (a matter of law). To this observer, the Supreme Court gave that *legal* question scant, if any, attention, focusing instead on the Inner House’s departure from the Lord Ordinary’s finding of *fact*. There is the slight suspicion that the Supreme Court Justices felt that the bank had badly treated Mr Carlyle, by encouraging him to borrow the purchase price for the land on the suggestion of further developmental funding which never materialised, and that the legal question of whether the bank’s obligation was sufficiently precisely formulated was skated over in order to do justice to Mr Carlyle.

By way of a final observation, and returning to the issue of Mr Carlyle’s counterclaim, it might be remarked that, in addition to missing the opportunity clearly to plead a unilateral promise (instead clumsily pleading a “collateral warranty”) a further opportunity was missed to plead misrepresentation on the bank’s part. If the bank’s statement was not a unilateral promise (which the Supreme Court suggests it would not have held it to be, had they been deciding the matter), it could at least surely be characterised as a misrepresentation, one reasonably relied upon by Mr Carlyle to his financial detriment. Such a misrepresentation would arguably found a right to damages, and in pleading such a ground there would have been no need to worry about the lack of specificity of the promise of a future loan: so long as it was reasonable for Mr Carlyle to have relied on the bank’s statement in deciding whether or not to enter into the loan of the purchase price (and it is suggested that it was), then such losses as flowed from his reliance ought to have been recoverable from the bank. Advancing Mr Carlyle’s claim on the basis of misrepresentation would have presented the Supreme Court with a more satisfying basis on which to have held the bank liable.

Martin Hogg, University of Edinburgh